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THE POLICE POWER AND THE RIGHT TO COMPENSATION.[1]

I.

IT is the purpose of this essay to indicate as briefly as possible how far the State, while acting on or affecting private property in virtue of its police power, is under a necessity of providing compensation to the owner for any loss he may have sustained. It is essential to a clear understanding of the subject to define "property"[2] and "police power," and to ascertain in what ways the State can "act on" or "affect" property.

Property is a legal fact, consisting of two relations. The first subsists between the owner and the *res*, or thing owned, and is *purely non-legal*, being simply the physical power of the owner to use the thing. The second subsists between the owner and the rest of society, and is *purely legal*, being the right of the owner that nobody shall interrupt or in any way prejudice the relations between himself and the subject of his ownership. Property may be limited in various ways; but, when it is full and complete, its non-legal element, the power of the owner to use the *res*, is limited only by the character of the *res* or by the capacities of the owner;

[1] This article is the Law School Association Prize Essay, and at the request of the *Harvard Law School Association* is sent to all the members.

[2] See the interesting remarks of Mr. Lewis in the preface to his recent book on "Eminent Domain." He says the "early cases attacked the subject wrong-end first, so to speak, through the word *taken*, instead of through the word *property*." Lewis, Em. Dom., p. i.

and its legal element, the right of the owner to be uninterrupted in the exercise of the power, is limited only by corresponding rights in others. In shorter terms, the owner has power to use what he owns; but he must use it lawfully, so that his neighbor shall not be injured.

Limitation of either of these elements of property is limitation *pro tanto* of property itself; but property still continues to exist until one or both of its elements is utterly destroyed. Wherever, therefore, and to whatever extent we find the two conjoined, that is, wherever and to whatever extent we find *a lawful power to use* a *res*, there and to exactly that extent we shall find property.

This definition, it will be observed, is wholly independent of any distinction between corporeal and incorporeal property, land or chattels on the one hand, and rights on the other. He in whom a right vests, as, for example, the promisee of a contract, can use it in a variety of ways. He can enforce it through the courts or otherwise; he can assign it, declare a trust on it, or release it. The only difference between a chose in action and a chose in possession, regarded as property, lies in the number and character of the uses of which each is capable. As property, both are protected by our law.[1] Lumley *v.* Gye,[2] and similar decisions rest on that ground.

The error of the ordinary definition of property as a right *in rem*, lies in the fact that that phrase declares that the relation between the owner and the thing is legal. It cannot be insisted on too strongly that the relation is purely physical, purely one of capacity to use on one side and adaptability to use on the other. Even where the *res*, that is the subject of property, depends for its legal validity on the sanction of law, the power to use it, is not created by law. The transfer of a right, for example, is the act of the parties in which the law takes no part. The legal relation, or right, that does undoubtedly exist in all property, exists, not between a person and a thing, but between persons only, between the owner and the rest of human society.[3]

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[1] 1 Harv. L. Rev. 9–10, by Prof. Ames. Cf. 2 Harv. L. Rev. 22, n. 1, by Mr. Schofield.

[2] 2 E. & B. 216 (1853). For other cases, see an article by Mr. Schofield on "The Principle of Lumley *v.* Gye and its Applications," 2 Harv. L. Rev. 19.

[3] The following passages from an article by Mr. Samuel B. Clarke in the first volume of the HARVARD LAW REVIEW, present an excellent illustration of the error that I have endeavored to point out (the italics are mine): "But when the question is of the re-

This conception of the nature of property involves a denial of the commonly received doctrine that there is a distinction between taking or destroying property and merely regulating its use.[1] Inasmuch as a power and a right are both essential elements of property, it follows that any restriction of either is *pro tanto* a taking or destruction of property itself. An illustration will make this position more intelligible. Suppose that a statute absolutely prohibits all sales of spirituous liquors for any purpose whatever, that another forbids sales, except for mechanical, chemical and medicinal purposes; that a third forbids only sales to Indians. A statute like the second has been held unconstitutional as amounting to a taking of property without due process of law, so far as regards liquors in existence at the passage of the act,[2] and *a fortiori* the court would hold similarly with regard to the first. In all probability, however, the decision would be different in the third case, on the ground that such a law would be a mere regulation of the use of property.[3] So to hold, however, is to establish a distinction in kind, whereas, in truth, there seems to be only a difference in degree. The real operation of these enactments is to limit the right of the liquor dealer to be uninterrupted while making use of his property, in this case, while selling it. It is evident that his power to sell is not affected, injuriously or otherwise, by mere force of the enactment; but the State has asserted a right to interfere if the power is exercised in contravention of its commands. The effect is that the number of lawful uses is diminished by these statutes, in greater or less degree according to the terms of each. The difference between them, therefore, is

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lations of human beings among themselves, he [Henry George] says (and who does not agree with him?) that each as against all others, and so far as interference with him by them is concerned, is entitled *to himself, to his life, to his liberty, to the fruits of his exertions, to the pursuit of happiness*, subject only to the equal correlative rights of every other human being." "Land is, literally, indispensable to life. . . . . *The right to life, therefore, involves a right to land, title to which vests at birth and by the fact of birth in every human being.*" [Criticisms upon Henry George, reviewed from the stand-point of justice, 1 Harv. L. Rev. 267, 270.] This is an argument based on the form of words, in which the right of property is usually stated, — an argument that falls to the ground, as it seems to me, if that form of words is inaccurate. It is the foundation of Henry George's land theory, and will serve as an example to show that the views set forth above, if correct, are not unimportant. See also, Austin, Jurisprudence, Lect. 14.

[1] Wynehamer *v.* The People, 13 N. Y. 378, 387, 399, 404 (1856), *per* Comstock, J.

[2] Wynehamer *v.* The People, 13 N. Y. 378 (1856).

[3] Wynehamer *v.* The People, 13 N. Y. 378, 404 (1856).

in this view purely quantitative, and logically does not justify the distinction that has in fact been adopted.

An undoubted case of the taking of property is found when there is a physical injury to, or destruction of, the *res* itself, such as the flooding of land,[1] or the abatement of a nuisance.[2] These destroy the owner's power to use his property. So statutes of limitations or of usury cause a partial or total destruction of previously existing contracts, and to the extent of their action take away the owner's power of use, that is, his power to enforce them through the courts. From these cases it would seem that any act of the State making a lawful use of property *unlawful* is a taking of that element of property which lies in the right of the owner, and is a proportionate taking of property itself, and any act of the State making a lawful use *impossible* is a taking of that element that lies in the power of the owner, and is also a taking of property.[3]

That the courts have had no basis of real distinction or difference on which to support their decisions in these questions of taking is not to be rashly asserted, even though we think that their expressed reasons are at fault. An examination of the authorities seems to show that generally when the injury has been substantial, the statutes have been held unconstitutional; but when it has been only slight they have been sustained.[4] In one case[5] it has been said that the injury must be direct, not remote or consequential, in order to invalidate the statute. Either of these views leaves the question so much to the individual judg-

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[1] Pumpelly *v.* The Green Bay Co., 13 Wall. 166 (1871).

[2] Rideout *v.* Knox, 19 N. E. Rep. (Mass.) 390 (1889).

[3] See 1 Hare, Const. Law, 383–5, for cases illustrating this distinction. The learned author seems almost to have perceived that there are these two elements in property. He certainly states and illustrates most excellently the rule laid down in the text above: "For as property is a right to the entire or partial use, occupation, or enjoyment of some specific thing, it may be taken *either by abrogating the right, or so dealing with the thing that the right cannot be beneficially executed or enjoyed.* A man's property is taken when his horse is carried away by a trespasser, or for the service of the government in time of war; but it is also taken when his goods or chattels are forfeited for felony or treason, as soon as the sentence is pronounced, and before the writ is issued to carry it into effect." *Ibid.*, p. 283. (The italics are mine.)

[4] Wynehamer *v.* The People, 13 N. Y. 378, 487–8 (1856). Cf. Bartemeyer *v.* Iowa, 18 Wall. 129, 133 (1873); Munn *v.* The People, 69 Ill. 80, 89 (1873); Mugler *v.* Kansas, 123 U. S. 623, 668–9 (1887); Rideout *v.* Knox, 19 N. E. Rep. (Mass.) 390 (1889), expressly put on that ground.

[5] Mugler *v.* The State, 29 Kans. 252, 273 (1883).

ment of each court as to afford an ample explanation of the wide divergence of actual decision.[1]

There is one class of cases, however, that forms an exception to the rule that regulation is a taking, and those are cases where the law is a command, not a prohibition; where the owner is put under a positive duty. If he is required to make certain specified uses of his property, if, for example, as an abutter on a highway, he is required to keep his sidewalks free from snow, he is not deprived of his property unless the duties so imposed are inconsistent with other uses of it, or unless obedience to the law requires expenditure of money or materials. A law of the latter kind is one requiring railroad companies to build and maintain cattle-guards at farm-crossings.[2] These cases and those which come under the head of taking or destroying seem to exhaust the enumeration of methods by which the State can so impair property as to give any claim for compensation.

II.

The definitions of the police power are nearly as numerous as the writers or judges who have attempted to define it. The general criticism to be made against them all is that they do not seem to be based on any well-defined criterion by which to test the cases as they arise. In view of this criticism we must try for ourselves to find such a criterion, and it will be found, I think, not in the mode of a State's activity, but in the object; not in the means, but in the end.

In all forms of government the object appears to be twofold, to secure the general safety and to provide for the general welfare. In pursuance of the first object, the State protects itself and its citizens against human wrong-doing and physical danger. In pursuance of the second it does all that it deems proper for the purpose of providing the general facilities of life, and of elevating the general standard of living. The first is the outcome of the natural tendency of sociable animals to band together for the sake of mutual protection. The second is an extended use of the principle of coöperation. The two purposes together include all the functions of government apart from those pertaining to its

[1] Compare with Wynehamer *v.* The People, 13 N. Y. 378 (1856), Mugler *v.* The State, 29 Kans. 252 (1883).

[2] Thorpe *v.* R. R. Co., 27 Vt. 140 (1855).

own organization.[1] They differ so fundamentally in their scope that they should be regarded as the foundation of two distinct powers. For one of them, the one acting for the general welfare, we have no one name, and in default of a better it may be called the coöperative power. The other, the power that preserves the general security, is the police power, which, to bring out the contrast between the two more strongly, may be called the protective power.

The scope of this definition will appear on comparison with others. In the famous "Passenger Cases"[2] Wayne, J., thus defines it: "Police powers, then, and sovereign powers are the same, the former being considered so many particular rights under that name or word, collectively placed in the hands of the sovereign." The learned judge seems to consider the police power coextensive with sovereignty. That is a consistent and perfectly possible definition; but it is open to the objection that it includes too much. In fact it includes the whole, and thereby deprives us of a concise and useful name for a part.

The power is sometimes said[3] to extend to the establishment of highways, postal and telegraph systems, and similar government institutions. These forms of governmental activity, however, do not rest on any basis of protection, either to the State or to its citizens. They rest on the power of the State to provide for the general welfare by giving to the public increased means of communication. Any definition which includes so much must, in consistency, include the whole coöperative power. But, as has already been said,[4] the general welfare and the general security comprise together the whole purpose of government, and if the police power is so far extended as to be coterminous with that, we must say with Wayne, J., that it is identical with

[1] Bluntschli makes the same distinction; but he fails to see that, with the exception stated above, it exhausts the forms of governmental power. "In dem Begriffe der Polizei lassen sich wohl jwei Hauptrichtungen desselben unterscheiden, die eine *negative*, welche den drohenden Schaden abwendet und die Hindernisse der freien Bewegung entfernt, die audere *positive*, welche das Gemeinwohl fördert. Die erstere *conservirende* hat man dann *Sicherheits-*, die zweite *productive Wohlfarts-polizei* genannt." Lehre vom Modernen Stat, vol. ii., p. 280. For the criticism of this view, see below, n. 3.

[2] 7 How. 283, 424 (1849). Cf. "License Cases," 5 How. 504, 583 (1847), *per* Taney, C. J.

[3] Bluntschli, Mod. Stat., vol. ii., p. 542. Cf. *ibid.*, p. 276 (translated in Tiedeman, Pol. Pow. 3–4) and p. 280 (quoted above, n. 1).

[4] *Ante*, p. 193–94.

sovereignty.[1] That definition, therefore, is also open to the objection of including so much as to lose its value.

Another definition [2] bases the police power on the maxim *sic utere tuo ut alienum non laedas*, which limits it to protection against invasions of rights and excludes dangers of non-human origin. The right to restrain the erection or the maintenance of a nuisance, however, seems to be identical with the right to build lighthouses and breakwaters, or to establish drainage systems and the signal service.

The maxim *salus populi suprema lex* is also said to be the foundation of the police power;[3] but it is open to the objection that it fails to include a number of cases that are generally recognized as manifestations of that power. The cases to which I refer are those where the State assumes the functions of an arbitrator between individuals, and for the purpose of reconciling conflicting interests, establishes such rules as it deems equitable. The justification of the State for legislation of this character is to be found in the private needs of the parties most concerned, and not in any supposed interest of the public. That the public have some interest, however, in such action by the State is not to be wholly denied; but it is a very remote interest, and is only the general necessity of maintaining peace and quiet among individuals. A most typical instance is a bankrupt law, by which creditors of the same debtor who could not all be paid in full are required to submit to partial payment in proportion to their claims. That is also the principle of Head *v.* Amoskeag Manufacturing Co.,[4] sustaining the validity of the so-called Mill

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[1] *Ante*, p. 194.

[2] Tiedeman, Pol. Pow. § 1. See also Cooley, Const. Lim. (5 ed.) 706; Comm. *v.* Alger, 7 Cush. 53, 84–5 (1851), *per* Shaw, C. J.

[3] State *v.* Noyes, 47 Me. 189, 211–12 (1859); Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191, 194 (1873).

[4] 113 U. S. 9 (1884). Gray, J., states the principle very well at p. 21. Mr. Lewis, in his recent book on Eminent Domain, § 183, strongly objects to the doctrine of that case. His argument is that the statute in question authorized the defendant to take the plaintiff's property, and that there can be a taking only under the power of eminent domain for a public use. A public use he defines (§ 165) as a use by the public. Since the defendant was a purely private corporation, on Mr. Lewis's assumptions, the argument is complete. The answer to it is that the State may, and frequently does, take property under the police power. Indeed it is the logical outcome of the theory of this essay that the phrase, "power of eminent domain," is merely a convenient term for certain forms of activity of the State, leaving the activities themselves to be classified according to their objects. If land is taken for purposes of protection, *e. g.*, to establish a system of sewers, it is taken

Acts, which authorize the building of dams for the sake of the water-power, even though the estates of upper riparian owners are thereby flooded. It is obvious that unlimited use of flowing waters is not open to all, and to prevent the inevitable conflicts that would otherwise arise, the Legislature, in these acts, makes an allotment of uses among those concerned.

Head *v.* Amoskeag Manufacturing Co. is to be carefully distinguished, however, from Wurts *v.* Hoagland,[1] which the court put on the same ground.[2] In that case a statute provided that any tract of marshy land within the State should be drained by the State upon the application of at least five owners of lots included in the tract, and that the expense should be apportioned among all the owners of such lots, in proportion to the benefit derived. There was no conflict of rights among the various proprietors in Wurts *v.* Hoagland, as there certainly was in Head *v.* Amoskeag Manufacturing Co. No one of them interfered in the least with any use or improvement by the others of their estates, and there was in fact no dispute to settle. The State, however, undertook to compel the owners, primarily for their common benefit, and only secondarily, and very indirectly, for the advantage of the general community, to join in improving their own property. It was, in truth, an exercise of the coöperative power precisely analogous to the exercise of the police power in Head *v.* Amoskeag Manufacturing Co. It was, however, a most arbitrary and despotic act, because the element of direct public advantage, which was very essential (and therein lies the distinction between the two cases) was wholly lacking. Except for the direct benefit of the whole community no man should be compelled to improve his estates against his will.[3]

III.

The Constitution of the United States, in the Fifth Amendment, says, "nor shall any private property be taken for public use without compensation;" but by the well-known rule of interpre-

under the police power; but if it is taken for the purpose of securing the public convenience, as for a highway, it is taken under the coöperative power. So of the power to tax, and the war power. War for conquest is coöperative; war in self-defence is protective. Cf. 2 Hare, Const. Law, 907–8.

[1] 114 U. S. 606 (1884).

[2] *Ibid.*, p. 614. Cf. Hagar *v.* Reclamation District, 111 U. S. 701 (1884).

[3] Tillman *v.* Kircher, 64 Ind. 104 (1878).

tation, since the States are not named in it, it limits only Federal power.[1] They have all, however, with the single exception of North Carolina,[2] adopted substantially similar provisions. The question, therefore, as to the rights of owners where no such clause has been embodied in the constitution is of small practical importance. As a theoretical matter their rights would depend on the power of the courts to declare a statute unconstitutional for conflicting with the higher law of personal rights and liberties. The better opinion seems to be that the courts have no such power.[3]

Judge Hare[4] strongly urges the view that the constitutional prohibitions are intended to restrain prospective as well as retro-

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[1] Barron *v.* Baltimore, 7 Pet. 243 (1833).

[2] For a complete collection of constitutional provisions on this point, see Lewis, Em. Dom. §§ 14–52 (1888). The law of North Carolina seems to be in a very uncertain condition. In an early case an act of assembly which repealed an act granting "all the property that has heretofore or shall hereafter escheat to the State" to the University of North Carolina, and which took back all escheated property that had not been legally sold by the University, was held void as repugnant to the 10th section of the Bill of Rights, which declared that "no freeman ought to be . . . deprived of his life, liberty or property, but by the law of the land." Trustees *v.* Foy, 1 Murph. 58 (1805). In another case, not later than 1814, the court said that an act emancipating slaves in accordance with the expressed desire of their deceased owner, but against the will of the administrator, was "too plainly in violation of the fundamental law of the land to be sanctioned by judicial authority," in reference perhaps to the same clause in the Bill of Rights. Adm'r of Allen *v.* Peden, 2 N. Car. L. Repos. 638. In neither of these cases was the question of compensation touched upon by the court, though in the first it was brought up in the argument of counsel. In R.R. Co. *v.* Davis, 2 Dev. & Bat. 451 (1837), there was a statute which authorized the plaintiff to take land for its road-bed, and provided that it should give compensation therefor. The court took the position that they would not decide whether compensation was rendered necessary by the constitutional phrase, "law of the land," but that *assuming it to be necessary*, the statute in question was not unconstitutional for failing to compel the railroad to pay for the land before it was taken. This precise position was also taken in a comparatively recent case, State *v.* McIver, 88 N. Car. 686 (1883), citing R.R. Co. *v.* Davis. These four decisions are all that I have been able to find on this point.

[3] Lewis, Em. Dom. § 10, and authorities cited. Judge Hare defines eminent domain to be "a right to provide for the common defence and the general welfare by purchasing such property as is specifically requisite for these ends, without the consent of the owner, and at a price set, not by contract, but according to certain general rules." 1 Hare, Const. Law, 333. He therefore thinks that "compensation is a correlative, without which the right to take private property for a public use would be tantamount to confiscation, and would consequently be due if there were no constitutional guaranties." *Ibid.*, p. 347; cf. pp. 348–9. Granting for the sake of argument that it is confiscation, whence does the court derive its power to prevent it, except from a clause declaring confiscation unlawful, or from one expressly investing the power in the court?

[4] 2 Hare, Const. Law, 776–8.

spective legislation. "A law consigning children thereafter born to servitude would be as much a deprivation as if it applied to the existing generation. Such an abuse is impliedly forbidden by the Fourteenth Amendment, as well as by the express terms of the Fifteenth; and the principle applies to every enactment which impairs the rights which those clauses are designed to secure." [1] It is at least doubtful, however, whether the courts would recognize his contention. Miller, J., in Bartemeyer *v.* Iowa,[2] expressly distinguishes these two forms of statutory action. "The weight of authority," he says,[3] "is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating, and even *prohibiting* the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property." Whether Judge Hare's construction is applicable generally, however, is a question apart from this subject; but it is obviously inapplicable to the provision for securing compensation; because there can be no measure of damages. We cannot estimate pecuniarily the value of a mere possibility of acquisition.

IV.

The question which is the subject of this essay may now be stated in this form, How far is a State, in the retrospective action of its protective power, released from the duty of providing compensation for owners of property which it has taken? It may be divided into two parts, the first comprising those cases where the State acts in defence of the individual as an individual; the second consisting of those where the safety of the community as a whole is the object.

1. It is the duty of the State to protect its citizens. That is the return it makes for the allegiance it demands from them. It is unnecessary, therefore, to look for any direct public advantage arising from the performance of this duty, and, indeed, there might be cases where the interests of the public would suffer from every standpoint, but that of moral obligation. In general,

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[1] 2 Hare, Const. Law, p. 778.
[2] 18 Wall. 129 (1873). [3] *Ibid.*, p. 133.

when the constitutionality of State interference in private matters has been upheld, the courts have put it on the ground of public safety or convenience;[1] but, probably, it would be nearer the truth to make justice between the parties, the real test.[2] That the question is not one of the public interests is evidenced by the fact that, in all the cases under this head of our subject, compensation, when that is necessary, is given, not by the State, but by one party to the other.

When the act of the State is a perversion of justice, its unconstitutionality can be declared only indirectly and through particular clauses in the constitution. That clause which secures compensation is in terms only applicable when the taking is for a public use; but these cases, where the taking is strictly and literally for a private use, can properly be brought within its limitation, on the principle that the greater includes the less. If property cannot be taken for a public use without creating a right to compensation, it surely cannot be taken for a private use without creating the same right.

The first and most obvious care of the State is to secure to each citizen a remedy for past invasions of his rights. To this end it establishes courts of law and of equity, with the various remedies that each offers. When equity compels specific performance, or declares the defendant a constructive trustee of a specific *res*, it does not deprive him of his property. The decree rests on a right of the plaintiff, higher in the sight of the court than that of the defendant. When, however, the question is not of specific property, but of pecuniary payments, different considerations may arise. If, in a given transaction, the defendant has made profits which the court thinks should go in whole or in part to the plaintiff, as having a better right, the principle is the same as in the case of specific property. As between the two, the profits belong to the plaintiff. In the case of damages, however, there is a taking, a decrease of the private property which the defendant had before he transgressed the plaintiff's rights. Especially is this true in the case of exemplary damages, or of recovery in *qui tam* actions; but assuming such judgments to be constitutional on other grounds, of which there may sometimes

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[1] State *v.* Noyes, 47 Me. 189, 212 (1859).

[2] Head *v.* Amoskeag Manufacturing Co., 113 U. S. 9, 21 (1884).

be doubt,[1] the question of compensation can never arise, for obvious reasons.

Damages are a recompense for a past wrong. The prevention of future wrong may also involve a taking of property, as in the abatement of a private nuisance. If it is a nuisance by pre-established law, the owner is not entitled to compensation for its destruction. It was wrongful in its inception, and equally wrong in its continuance. The circumstances are very different, however, if a person has built a structure which is subsequently declared by statute to be a private nuisance. In one case it has been held that the statute was not unconstitutional, even though it made no provision for compensation to the owner.[2] The statute in question enacted that "any fence, or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying owners or occupants of adjoining property, shall be deemed a private nuisance," and then gave a remedy by abatement. It must be admitted that the rights of the owner of the nuisance are at a minimum, because his act was the result of a most malicious intent. Nevertheless, he has been keeping strictly within the bounds of his lawful power. It is to be remembered, too, that the statute had to do with no public interests; it dealt merely with the private relations of individuals. Its effect was to destroy one man's property for the benefit of another, and it could be justified only if it worked strict justice between the two. That the taking was proper there can be no doubt; but compensation was necessary to prevent injustice.

There is another class of cases, already adverted to, where there is a conflict of interests among individuals, and the State assumes to act as arbitrator. The conflict is due to an impossibility that all should use their full rights and powers on the same thing, or at the same time. The State cuts the knot of the difficulty by reducing the rights of all evenly, or, if that is impossible or not conducive to justice, by giving one greater rights than the others on condition of his indemnifying them.

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[1] See Koerner *v.* Oberly, 56 Ind. 284 (1877), in which exemplary damages in a civil suit, when the defendant was also criminally liable, were held unconstitutional, as putting him twice in jeopardy for the same offence.

[2] Rideout *v.* Knox, 19 N. E. Rep. (Mass.) 390 (1889). The court admit the full consequences of their decision, but go on to say that "the case is not so hard as it seems," and mention certain mitigating circumstances.

A bankruptcy law is a case of the first kind, — a case of even reduction. It would be valid, even in its retrospective action, although it should make no provision for compensation to any of the creditors. It is not the duty of the State to pay damages, because it is not the duty of the State to guarantee private debts. No one of the creditors can be put under obligation to indemnify the others, because no one of them has received an undue advantage. So, in a partition suit, if the land is divided equally among the co-tenants, or, if it is sold and the proceeds so divided, none of them has any claim against the rest.

In the majority of cases, however, a preference is given to one or the other of the persons interested, and whoever receives it must pay for it. This principle is in practice rarely violated. Thus in a partition suit, if the land cannot be divided equally, it will be set off to any one of the co-tenants who is willing to pay for it, and he must reimburse the rest.[1] In Head *v.* Amoskeag Manufacturing Company,[2] where the right to use flowing water was given to the company at the expense of the riparian owners, indemnity to them was secured, and without it, the statute would undoubtedly be held unconstitutional.

The so-called Watuppa Pond cases,[3] recently before the Supreme Court of Massachusetts, may, perhaps, be regarded as involving the same principle. The parties plaintiff had water-privileges of great value on a non-navigable stream, the outlet of the Watuppa Ponds. The city of Fall River had a right to use a limited amount of the same water for municipal purposes, and by the statute brought in question, the Legislature had increased the city's privilege, thereby proportionately depriving the plaintiffs of what they had been entitled to use. The statute provided that the city should be "without liability to pay any other damages than the State itself would be legally liable to pay." In virtue of certain local statutes, the court held that the State owned these waters, and that its permission to the plaintiff to use them conveyed no vested right, and therefore, since the State was not under duty to provide compensation for retracting its permission, the city of Fall River was not liable. The question was

[1] For cases on the partition of land see cases cited in the opinion of Gray, J., in Head *v.* Amoskeag Manufacturing Co., 113 U. S. 9, 21 (1884).

[2] 113 U. S. 9 (1884).

[3] Watuppa Reservoir Co. *v.* Fall River, 147 Mass. 548 (1888).

not really one of property, though it has been so treated.[1] The plaintiffs and the defendant had had the use of the water apportioned between them. By the new law a different division of the use was made, whereby the city gained an advantage at the expense of the plaintiff, and justice required that the latter should be reimbursed.

Perhaps failure to give compensation under this rule would *not* be a ground for invalidating a statute of limitations. The plaintiff has a right of action against the defendant; but the defendant can properly demand that he use it in a reasonable time. In order to reconcile these conflicting claims, statutes of limitation are passed which limit the period in which the plaintiff can bring suit. In their retroactive effect they destroy property belonging to the plaintiff, by taking away his right of action. Though they are usually held unconstitutional, as impairing the obligation of contracts,[2] it might be said that they take property without due process of law. The question of compensation would be immaterial. To require compensation from the defendant would leave him in practically the same position that he occupied before the act was passed. Instead of being liable on the old cause of action, he would be liable to the extent of its value, because it was taken away for his benefit.

2. It is the duty of the State to protect the community as a whole, as well as to protect private individuals; and, in so doing, the public interests are of paramount importance. The constitutional prohibition against taking private property for a public use, without compensation, applies to this part of our subject with strict literalness.

Fines and penal forfeitures involve a taking of property; but compensation to the owner is out of the question. If they are unconstitutional it must be, from the nature of the case, on other grounds.

The community, like individuals, may guard itself against future or continued injury; and this right justifies the abatement of public nuisances. Though the owner is deprived of his property, he has no just claim to damages. He has been a wrong-doer, and the community merely uses its natural right of self-preservation

[1] For a discussion of the nature of the plaintiff's property, *pro* and *con*, see 2 Harv. L. Rev. 195, 316; 3 *ibid.* 1.

[2] Berry *v.* Ransdall, 4 Met. (Ky.) 292 (1863).

against him. Similarly the State may seize articles which the owner is likely to use in such ways as endanger the public safety, *e.g.*, gambling tools, or property such as gunpowder, which is in its nature dangerous.[1] In all these cases the owner has been more or less blameworthy, and has forfeited his claim to consideration.

Suppose, however, property becomes dangerous to the community through no fault of the owner, and is destroyed to prevent the danger, as when buildings are blown up to prevent the spreading of fire in a city. Even here it is settled law that the owner is not protected. Senator Porter[2] well represents the attitude of the courts. "[The constitution of New York] declares that private property shall not be taken without just compensation; while the common law rule protects any individual who has destroyed it in a case of necessity and to arrest a greater impending calamity. It has not been suggested, in the argument on this point, that the constitution has abrogated that rule; nor do I perceive how the rule can be impugned." It will be noticed that the learned Senator did not understand that there might be a taking which was justifiable in itself, and which would at the same time render the State liable to a claim for compensation. He thought that because the State could destroy the property, it could destroy it without paying for it. The following historical explanation of his assumption is put forward tentatively. The earliest case in this country involving the principle in question was Sparhawk *v.* Respublica[3] in 1788, where, during the Revolution, the colonial government took the plaintiff's property and carried it away to a place of safety to prevent the British troops from seizing it. It was seized by them, however, where it was deposited, and the question was whether the plaintiff could get compensation. The court decided the question against him, citing many English cases in support of their judgment. That decision and its citations seem to have been the basis of our present law. The authorities on which the judges relied were all cases of trespass in which the question was whether the defendant was a tort-feasor for destroying or injuring the plaintiff's property for the sake of protecting himself or the community. To hold that he

[1] For a good statement of the theory of forfeitures and seizures see the opinion of Shaw, C. J., in Fisher *v.* McGirr, 1 Gray, 1, 27 (1854).

[2] Russell *v.* Mayor of N. Y., 2 Den. 461 (1845).

[3] Dall. 357.

was a tort-feasor was to deny in effect the right of self-preservation, and that the courts with perfect consistency refused to do. So far as I know, no action was ever brought to try the question whether the defendant, admitting him not to be a tort-feasor, was yet under a duty to indemnify the plaintiff for the loss he had innocently caused. It seems to have been tacitly assumed that because he was not liable in tort, he was not liable at all, even in an action where tort played no part. That tacit assumption has been transmitted in this country into the great constitutional rule that if the State is justified in taking without due process of law, it may also take without giving compensation, — a rule that seems to be well-nigh universal.[1]

A case which really presents the same question arises under the retrospective action of laws declaring certain trades or occupations to be dangerous to the public health or morals and prohibiting them as public nuisances. Has the owner of property invested in such a trade any right to compensation when he has been forbidden to continue it and his property has been forfeited or reduced in value? That the State is justified in taking such measures cannot be denied, and the power has been sustained by the courts in an almost endless line of decisions. It is equally well settled that there is no necessity of giving compensation, though there are *dicta* to the contrary.[2] The courts have usually avoided the difficulty by declaring that such statutes merely regulate the use of the property, and do not amount to a taking;[3] but sometimes the question has been squarely met and compensation has been denied.[4]

While the law seems to be general that for a destruction of property in the interests of public safety, the owner has no claim to reimbursement, it seems to be equally well recognized that when the State uses property, or takes it intending to use it, for such purposes, compensation must be rendered.[5]

The distinction which the courts have established between

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[1] For cases on destroying buildings to arrest a conflagration see 2 Hare, Const. Law, 907, n. 3. Cases on destroying property under imminent danger from hostile troops are collected in the opinion in U. S. *v.* Pac. R.R., 120 U. S. 227 (1886).

[2] Bartemeyer *v.* Iowa, 18 Wall. 129, 136 (1873).

[3] Mugler *v.* Kansas, 123 U. S. 623 (1887).

[4] People *v.* Hawley, 3 Mich. 330 (1854).

[5] Mitchell *v.* Harmony, 13 How. 115 (1851). That the taking was for an intended use see p. 135; U. S. *v.* Russell, 13 Wall. 623 (1871); Dooley *v.* City, 82 Mo. 444 (1884).

destruction and appropriation is, I believe, without an exception; but it does not seem to be founded on any principle of sound justice. In all these cases property has been taken for the public good, and the mode of the taking would seem to be immaterial. The owner has been guilty of no legal wrong, and his property should not be confiscated. The community should pay for the benefit it has received at his expense.

It remains to consider those cases where the owner is put under a duty to use his property in specific ways. As has been said already, unless such a regulation prevents the property from being otherwise employed, or unless it compels an expenditure of money and materials, it is not a taking, and no question of compensation can arise. Such a statute as one requiring steam-engines to blow whistles within a certain distance of every crossing[1] gives no claim to indemnity. The cases within the exception, however, might possibly raise a doubt. Laws necessitating expenditure in order to secure safeguards against the dangers incident to the owner's business seem to have been passed most frequently with reference to railroads. It seems to be admitted[2] that the State can compel the railroads to respond in damages for every accident due to failure to comply with the statutory requisitions. If they are thus punished for their neglect, they can hardly be entitled to indemnity if they obey. That seems to be just. Whoever under takes a business dangerous to others should see at his peril that they are not injured. In this class of cases compensation is not necessary, and I think it has never been granted.

Everett V. Abbot.

CAMBRIDGE, 1889.

[1] R.R. Co. *v.* Brown, 67 Ind. 45 (1879).

[2] Thorp *v.* R.R. Co., 27 Vt. 140 (1854); Lewis, Em. Dom. § 156, and cases cited.